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Supreme Court of the United States.

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THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

v.

LEIGH ROBINSON AND CONWAY ROBINSON, JR., EXECUTORS OF THE WILL OF CONWAY ROBINSON, DECEASED.

In Error to the Court of Appeals of the District of Columbia.

Brief for the District of Columbia, Plaintiff in Error.

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On August 28, 1882, Conway Robinson sued the District of Columbia to recover $50,000 damages for alleged trespasses upon his tract of land called the "Vineyard" (Rec., p. 1); the acts of trespass complained of being the breaking and entering his close and taking and carrying away and converting to its own use 4,683 cubic yards of gravel, and digging a trench 386 feet long, 33 feet wide and 14 feet deep, and changing the grade of a lane, etc. To this action the defendant pleaded the general issue and the statute of limitations (Rec., p. 6). The plaintiff joined issue as to the first plea, and demurred to the second (Rec., p. 7). The case stood in that condition, without any disposition of the demurrer, until February 18, 1884, when the death of the plaintiff was suggested by his attorney (Rec., p. 8).

On October 29, 1886, the appellees, executors of the said Conway Robinson, deceased, filed an "amended declaration" (Rec., p. 8), containing four counts. The first count alleged that the defendant took and carried away and converted to its own use 4,683 cubic yards of gravel from Harewood road, the property of the said Conway Robinson; the second count alleged that the defendant took said gravel and used it in repairing other roads than Harewood road; the third count alleged that the defendant, with force and arms, broke and entered the close of said Conway Robinson, and the fourth count alleged that the defendant, with force and arms, broke and entered the close of said Conway Robinson, excavated a trench 386 feet long, 14 feet deep and 50 feet wide, thereby separating parts of the said close from other parts and impairing its value as suburban property, etc.

On December 30, 1886, the defendant pleaded to the "amended declaration" the general issue, and issue was joined thereon. Leave was granted the defendant October 23, 1895, to file additional pleas (Rec., p. 14); under this leave defendant filed three pleas: first, the statute of limitations of three years; second, *liberum tenementum*; and, third, that the trespasses complained of consisted in the excavation and removal of gravel and soil from within the lines of a public highway known as Harewood road, in the District of Columbia. Upon motion said first plea was stricken out, and a demurrer to the second plea was sustained. The case was tried on the general issue, and the third plea to the amended declaration.

STATEMENT OF THE CASE.

In 1880 and 1881, the Engineer Department of the District of Columbia, supposing that what is known as Harewood road was a public highway of the width of 33

feet, entered upon it and improved its grade by cutting down a steep hill and using the earth and gravel taken from the excavation in the improvement of Seventh street road, or Brightwood avenue, and other roads intersecting the said Harewood road, and forming part of the system of public roads in that locality. All the grading and removal of gravel was done within the lines of certain boundary stones marked "L. C.," which had been set at the angles of the road by direction of the late Levy Court of the District of Columbia. In the process of grading and improving Harewood road several trees within the lines marked by the boundary stones were felled. The testator of the defendants in error, Conway Robinson, who owned the land on both sides of the road at the point where the excavation was made, objected to the cutting and the removal of gravel, on the ground that the road was a private road, and that the gravel and soil in the bed of it belonged to him, and in 1882 filed a bill for discovery, on the equity side of the court below, against the District of Columbia, and its then Commissioners, and the assistants to the then Engineer Commissioner, Major Twining (Rec. p. 26), alleging, among other things, that he was the owner in fee simple of a tract of land containing about 74 acres, lying on both sides of Harewood road, and after setting out a chain of title to said land, the bill proceeded to allege that the trespasses complained of were committed by the agents and employees of the District of Columbia, and by the directions, instructions and orders of its then Commissioners, who pretended that said acts were done for the benefit of the District, but that the complainant was advised and believed and therefore charged that what was done by said Commissioners exceeded their authority, and that neither the Engineer Commissioner nor the other Commissioners could protect themselves by setting up that what they had done was for the public benefit; that the complainant intended to bring actions against the District of Columbia and said Commissioners, to recover just

compensation for the gravel taken and carried away, and for the alleged wrong and injury. To this bill for discovery the defendant answered that the lane or road known as Harewood road referred to in the 21st paragraph of said bill was a public road; that it had been used by the public as a public road for more than forty years; that no gate, bar, or other obstruction had ever during that time been used to obstruct the free use of the same; that the lines of said road were marked by stones, planted by direction of the Levy Court of the District of Columbia, in accordance with an act of Congress approved in 1863, soon after the passage of said act; they denied that complainant had ever exercised acts of ownership over the said road during the past forty years inconsistent with the right of the public to use and enjoy it as a public highway. That about July, 1880, some gravel was taken from Harewood road for use on Bunker Hill road, and again in 1881 for use on Seventh street road; that no complaint or protest against the taking of gravel was made to any one of said defendants until near the close of the work; that the cutting of the road was done with a view to improve its grade, and did greatly improve it by cutting off the top of a small hill, which had a steep ascent on each side, and by which the complainant was especially and largely benefited, and further gave the amount of gravel taken from the said road, and where the same was used upon other roads in the vicinity, and the names of the persons who had charge of the work. This answer was not excepted to by the complainant, and no further proceedings were had in the cause.

At the trial the plaintiffs' evidence tended to show that "Duley's lane," afterward called "Agg road," and now called "Harewood road," existed at the beginning of the present century; that travel over Duley's lane originated for the accommodation of some prior owner or owners of the tracts lying on the east and west thereof; that afterward they permitted some of their neighbors to travel over said lane or

way, and still later permitted others to travel over it, and *finally people generally were permitted to travel over it* (Rec. p. 21); that about 1848 John Agg, who then owned the land described in the declaration, changed the course of the road at the *locus in quo* by removing it further from his house; that before the late civil war Harewood road was but little traveled; that there was a fence on the south of said road, but none on the north; that from 1842 to 1857, when Conway Robinson purchased the tract called the "Vineyard," a gate was maintained across what is now Harewood road, where it crossed and left the eastern boundary of said tract, and that on the western boundary of said tract two gate-posts stood on opposite sides of said road until some time in 1861, when they disappeared; that said road down to the close of the late civil war was so narrow that two carriages could not pass one another without one of them turning out, and that at the time of the alleged trespass the traveled part of said road was not greater than twenty-five feet in width, and that said road was not repaired or recognized by the public authorities until after the civil war; that the plaintiffs' testator paid taxes upon the land within the area of said road (Rec. p. 25); that the location and direction of said road, after Agg changed part of it, has not been changed, and since 1861 it has been pretty generally used by anyone who had a desire to pass over it, either driving or walking, at any time of the year (Rec. p. 25); that between 1866 and 1868 boundary stones marked "L. C." were placed along it, about 33 feet apart from one side to the other by the Levy Court, and beyond the width of the road-bed as used; that after the late civil war, and until the trespasses complained of, ordinary superficial repairs to the road were made by the public authorities (Rec. p. 26); that the defendant took gravel from Harewood road in 1880 and 1881 against the protest of the plaintiffs' testator and lowered the grade of part of Harewood road and thereby made an excavation about 418 feet long and from 10 inches to 14 feet in depth and 33 feet wide,

and that the effect of making said cut was to separate his tract of land and put him to the expense of grading; that some valuable trees were removed and a desirable outlook destroyed; that about 4,000 cubic yards of gravel, worth 20 cents per yard, were taken and used to repair Seventh-street road.

The evidence for the defendant (Rec. p. 32) tended to show that Harewood road over the plaintiffs' testator's land had been used continuously by the public as a county road from 1848 down to the time of the alleged trespasses; that during all that time there had been no barrier or obstruction to its use by the public, such as fences, gates, or bars, placed there by the owner or owners of the adjoining land, or anyone in their interest; that the only evidence of a gate or bar ever having existed across said road at any point was the remains of two ancient gate posts at the brow of the hill on the eastern boundary line of Agg's place, where some large trees stood, one on each side of Harewood road, the gate itself having disappeared in the time of Mr. Agg, a former owner, from whom the plaintiffs' testator acquired title, and before he purchased; that the public use of Harewood road consisted in its use by all manner of people at their will and pleasure, by day and night, passing along and over it on foot, with horses and cattle, in wagons, and in other vehicles; that while this use prior to 1861 was more or less confined to people living on farms in the neighborhood, it had much increased of late years, and especially since the late civil war, when it was used by soldiers and by the general public as a thoroughfare; that, except in this increased use of the road, there had been no material change, the road in its outline and direction had remained the same; that the two old gate posts, which stood one on each side of said Harewood road, were situated near the entrance to what is known as the Middleton tract, near the point where the excavation complained of was made; that before the late civil

war Mr. Enos Ray, as Supervisor of County Roads, performed work on Harewood road and repaired it as other public roads were repaired, and kept it in order; that the expenses of repairing and keeping Harewood road in repair by Mr. Ray were paid for at different times by the late Levy Court, as the work was done (Rec., p. 34); that boundary stones were planted at the angles of Harewood road under the authority of the Levy Court in 1867 or 1868; that some of those stones are to be found in place to this date; that the taking of gravel from Harewood road in 1880 and 1881 was to improve the grade of the road; that it lightened the pull up the hill and made the road better; that the length of the cut was between 300 and 400 feet, and the greatest depth was from 12 to 15 feet; that the improvement of the road consisted in taking away the elevation of the hill; that the repairs made upon Harewood road during Mr. Ray's time as supervisor were the ordinary repairs to public highway.

One of the defendant's witnesses, James Johnson, testified that he had known what is now called "Harewood road" since 1835; that everybody living along the road used it as they did all other county roads; that in 1835 there were only two or three farms along the line of the road, and the people from those farms used to travel it with their wagons, horses and cattle; that the witness knew Mr. Agg, who formerly owned the place now owned by the Robinsons, and that no objection was ever made by him or by Mr. Robinson while he lived to such use of Harewood road; that he had seen repairs being made on Harewood road, but does not recollect exactly who made them or when; that the Levy Court had work done on this road before the Soldiers' Home property was acquired by the United States from Mr. Riggs; that Harewood road, since it has been used for public travel, has been known by different names, it was called the Agg road, the Soldier's Home road, the Glenwood road, and lastly Harewood road; that Harewood

road was used by country people to get to the Rock Creek Church, and it connected with what was called the Rock Creek Church road; that the witness was a policeman from 1861 to 1871, and during that time made reports to the Levy Court of the condition of Harewood road when it was out of repair; that the Levy Court, upon the receipt of such reports, would send men to repair it; that on the side of the road opposite the place where the cut or excavation complained of was made, there were a couple of old gate posts, but there had not been a gate there during the time witness had known the road.

John W. Ray, for the defendant, gave evidence tending to prove that as a boy, forty or forty-five years ago, he used to travel Harewood road daily, tending to his father's cattle, and that he never knew of any gates across said road.

Theodore Sheckels, another of the defendant's witnesses (Rec., p. 36), gave evidence tending to show that he had known what is now Harewood road since 1845, at which time it appeared to be a public road, and was a public road; that there were then no gates, bars, or barriers across it, but there was a gate on the side of the road leading into Sam Harrison's place; that there was also a gate that went into what is now the Robinson place, from the road at the top of the hill; that the late Levy Court years ago would, from time to time, repair the surface of Harewood road, making it passable.

George N. Beale, also a witness for the defendant, gave evidence tending to show that he had known Harewood road for 55 years, and he never saw any gates or barriers across it; that the witness was Supervisor of County Roads for the District in 1880 and 1881, and took gravel from Harewood road and used it on Seventh street road, Harewood road, Bunker Hill road, and Lincoln avenue; that Bunker Hill and Rock Creek Church roads connect with Harewood road; that Harewood road as used was about 25

feet wide, but the Levy Court had designated the width to be 33 feet; that the excavation complained of was between the lines of the Levy Court stones.

J. Enos Ray, for the defendant, gave testimony tending to show that he was Road Supervisor of the District from 1869 to 1871, and that he then worked Harewood road; that he saw a map of Harewood road and other roads of the District among the records of the late Levy Court of the District at their rooms in the City Hall in this city; that the Levy Court had maps of Harewood road as of all other roads in the county; that the late Nicholas Callan was secretary of the Levy Court; that witness did not know when the maps he saw in the rooms of the Levy Court were made, but they embraced several roads—the Sheperd road, Rock Creek Church road, Bunker Hill road, and Harewood road.

William Tindall, for the defendant, gave evidence tending to show that he was secretary to the Governor of the District in 1871, and that, acting under the direction of the treasurer of the Board of Public Works, he obtained from Mr. Tenney, former secretary of the Levy Court, what were supposed to be all the records of that court, and turned them over to said treasurer.

William P. Richards, also a witness for the defendant, gave evidence tending to show that he was a civil engineer, and that under the direction of the District Commissioners he had made an examination of the archives of the District of Columbia to find the records and maps belonging to the Levy Court, relative to Harewood road; that he had found some maps, among them one made in 1873 by Mr. Carpenter, and also a copy of a Levy Court map; that said maps and records were found in the vault of the old District building on First street; that he found no other maps or records relating to the Levy Court or Harewood road; that the second map he found was a copy of an original map showing the roads of the District signed by the President

of the Levy Court; that the said first map was in pen-work and was an original map made in 1873; that there is another map among the District archives, which professes to have been made by Mr. Boscke in 1857; that the Boscke map is an original map, made by him when an employee of the Coast Survey; that on all these maps Harewood road is laid down as 33 feet wide by scale; that none of said maps give the courses and distances of the roads laid down thereon, and none of them show angles in Harewood road; that Harewood road was surveyed by the witness in 1892, and he found its width to be the same as laid down on the Boscke map; that the area of the Robinson tract, including Harewood road, is 74.93 acres, but the area assessed for taxation since 1840 is but 74½ acres; that the area of the land in the road is 1⅛ acres; and that $\frac{9}{10}$ of an acre of said road is assessed for taxation.

William Forsyth gave evidence for the defendant tending to show that he was a civil engineer; that he was surveyor of the city of Washington, except for a short interval, from 1857 to 1871, and was surveyor of the District of Columbia from 1871 to 1897; that he knew Boscke, the author of the Boscke map referred to by the witness Richards; that Boscke was a civil engineer and was employed for a time in the U. S. Coast Survey; that Boscke had adequate knowledge to enable him to make a good map of the District, and that he prepared such a map; and thereupon the maps referred to by witness Richards were given in evidence.

Benjamin F. Leighton and George Truesdell, also witnesses for the defendant, gave evidence tending to show that they had had experience in suburban subdivisions in the District of Columbia, and knew Harewood road; that in 1889, at the request of the attorney for the District of Columbia, they and Mr. B. H. Warner examined the alleged injury to the land of the plaintiff's testator, and found that no damage had been done, but that, on the contrary, the

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alteration in the grade of Harewood road benefited the Robinson property.

The trial resulted in a verdict and judgment for the plaintiffs for $8,006 (Rec., p. 17).

A motion for a new trial being overruled, the defendant entered an appeal to the Court of Appeals upon a bill of exceptions (Rec., p. 19).

The trial judge certified (Rec., p. 39) that the "*bill of exceptions contains all the evidence given by both parties*" at the trial of the cause.

The Court of Appeals affirmed the judgment of the Supreme Court of the District of Columbia, and the defendant below took the present writ of error (Rec., p. 21).

The opinion of the Court of Appeals is set out on page 65. The dissenting opinion of Alvey, Chief Justice, is set out on page 79.

ASSIGNMENT OF ERRORS.

The Court of Appeals erred—

1. In sustaining the granting of the second prayer (Rec., p. 39) of the defendants in error and thereby holding that whether Harewood road was a public highway or not was for the determination of the jury; and in sustaining the refusal to grant the first (Rec., p. 44) and eighteenth (Rec., p. 47) prayers of the plaintiff in error, and thereby holding that Harewood road was not a public highway; and in sustaining the refusal to grant the thirteenth prayer (Rec., p. 46) of the plaintiff in error to instruct the jury that there was no evidence of any adverse claim or act of the testator of defendants in error which interfered with or defeated the right of the public in the road as a public highway.

2. In sustaining the granting of the eighth prayer (Rec., p. 41) of the defendants in error, and thereby submitting to

the jury to find and determine whether the plaintiff in error had acquired the right of common and public highway in Harewood road, a mixed question of law and fact; and also to determine a pure question of law, to wit: Whether the District of Columbia had done the acts constituting the alleged trespass "without the execution of its lawful powers according to law."

3. In sustaining the granting of the eleventh prayer (Rec., p. 42) of the defendants in error and thereby submitting to the jury a question of law, to wit: Whether "the gravel was obtained incident to the lawful exercise of the power to grade."

4. In sustaining the granting of the twelfth prayer (Rec., p. 42), of the defendants in error and thereby submitting to the jury to find and determine both the law and facts of the case; and also thereby holding that if the jury found any one of the facts enumerated in said prayer without regard to its probative force, it would tend to prove Harewood road was not a public way and rebut any presumption that it was a public highway.

5. In sustaining the modification of the second, third (Rec., p. 44), fifth (Rec., p. 45), and twentieth (Rec., p. 47) prayers of the plaintiff in error and thereby holding that Harewood road was not a public highway, although the jury should find that it had been generally used and recognized as a public county road for the uninterrupted period of twenty years prior to the alleged trespass, unless the jury found affirmatively that such use and recognition was adverse to the owner of the fee.

6. In sustaining the modification of the sixth prayer (Rec., p. 45) of the plaintiff in error, addressed to a highway by grant, so as to make the same relate to a highway by prescription.

7. In sustaining the granting of the fourth prayer (Rec., p. 40) of the defendants in error, and thereby holding that the prescriptive right of highway is confined to the

width as actually and without any intermission used for the period of twenty years.

8. In sustaining the modification of the ninth prayer (Rec., p. 45) of the plaintiff in error, and thereby allowing the jury to consider the alleged motive of the District of Columbia in grading Harewood road.

9. In sustaining the modification of the twelfth prayer (Rec., p. 46) of the plaintiff in error, and thereby depriving it of the presumption *omnia rite acta* in respect of public acts required to be performed.

10. In sustaining the refusal to grant the seventeenth prayer (Rec., p. 47) of the plaintiff in error, and thereby holding that Harewood road was not a public road by dedication.

11. In sustaining the refusal to grant the twenty-third prayer (Rec., p. 48) of the plaintiff in error, and thereby holding that the defendants in error were not bound by the answer of the Commissioners to the bill of discovery filed by the testator of the defendants in error respecting the *bona fides* of the action of said Commissioners in respect of the alteration of Harewood road and the purpose of such alteration.

12. In sustaining the granting of the thirteenth prayer (43) of the defendants in error and thereby holding that the jury might enhance the damages that would make them whole by any sum not greater than the interest on such amount from the time of the filing of the original declaration.

ARGUMENT.

I.

Harewood Road Was a Public Highway.

On the whole evidence the jury should have been told that Harewood road was a public highway. It was such

either by prescription to the width it was actually used or by dedication to a width of 33 feet. There was also sufficient proof to show a statutory road. Mr. Chief Justice Alvey said in his dissenting opinion (Rec., p. 79):

> "I am very decidedly of opinion that there ought to be a retrial of this case, if for no other reason, because of the undue latitude given the jury in determining the rights of the parties."

The public certainly had acquired some rights in Harewood road, but as this case adjudicates them it is impossible to say what those rights are and to what extent they may be exercised.

On the evidence of the defendants in error alone it was plain that the testator of the defendants in error had dedicated Harewood road. On the whole evidence the trial judge should have instructed the jury that Mr. Robinson dedicated Harewood road to the full width of 33 feet. Boundary stones lettered "L. C.," designating a road of that width, were set by the Levy Court in the presence of their testator, who was a lawyer and knew that the Levy Court stones indicated that the public claimed a road 33 feet wide. Mr. Robinson, by his silence, acquiesced in that claim.

Before the Levy Court set the boundary stones, in 1868, Mr. Robinson had acquiesced in the use of the road by the public for *eleven years*. If there ever were any gates across Harewood road, or any obstructions to the use of it by the public, they were removed prior to Mr. Robinson's acquisition of the property.

The Court of Appeals erred in sustaining the granting of the second prayer (Rec., p. 39) of the defendants in error and thereby holding that whether Harewood road was a public highway or not was for the determination of the jury; and in sustaining the refusal to grant the first (Rec., p. 44) and eighteenth (Rec., p. 47) prayers of the plaintiff in error and thereby holding that Harewood road was not a public

highway; and in sustaining the refusal to grant the thirteenth prayer (Rec., p. 46) of the plaintiff in error to instruct the jury that there was no evidence of any adverse claim or act of the testator of defendants in error which interfered with or defeated the right of the public in the road as a public highway.

This second prayer of the defendants in error (Rec., p. 39) was not clear, and practically left the jury to determine the question whether Harewood road was a public highway. It assumed without evidence that their testator had objected to Harewood road being considered a public highway to the width it was used by the public, or that he ever gave the public any permission, leave, or license to use Harewood road over his land. The only evidence upon this point was that Mr. Robinson in 1880 and 1881, after Harewood road had been used by the public for more than half a century, and after he himself had acquiesced in such use for twenty-three years, objected to a change of grade and the removal of gravel. There was no evidence that Mr. Robinson ever denied the right of the public to use Harewood road from 1857, when he acquired the land abutting upon it, down to 1880 and 1881, when the District changed the grade. He never placed any gate or barrier across Harewood road to prevent people from using it. He never in fact objected to or obstructed the use by the public of this road. On the contrary, he encouraged such use.

The inconsequential acts set out in the bills of exceptions, such as his alleged objection to a road supervisor who was working the Harewood road at one time draining water off on a particular side when he wanted it on the other, can not as a matter of law in any way militate against the rights of the public. These acts were not inconsistent with the right of the public to use the road.

One of the leading cases on the subject of public highways and the mode of acquiring them is Day *vs.* Allender, 22 Md. 511. That case was trespass *vi et armis*, and the

defendant pleaded, among other pleas, a public highway across the *locus in quo*, and justified the cutting of fences erected by the plaintiff because it obstructed the public highway. In the course of the opinion it is said:

> "A summary of the English law, on the manner of establishing highways, will be found in Woolrych on Ways, 4 Law Lib. 9. 'With respect to a highway,' in the words of Hale, C. J., 'much depends upon common reputation. And if the owner of land permit the public to pass and repass over his soil without molestation or any assertion of his rights, for some time, the law will presume a dedication of the way to general use. Much discussion has arisen as to the period which must elapse before such a dedication will be presumed, and the attention of the reader will be presently directed to it. It seems, therefore, that a highway may be claimed, first, from time immemorial, and next by reason of such sufferance of public use within time of memory as will lead to the conclusion that the original proprietor had designed a common benefit for all the king's subjects. . . . The same principle appears to be applicable to common ways. . . . If evidence be adduced to show that a particular road has been used as a public way and always considered as such, it seems that a claim of highways will be made out.'
>
> "The American law on this subject is, happily, condensed in section 662 of Greenleaf's Evidence, Vol. 2, title 'Way.' 'The existence of a public way is proved either by a copy of the record, or by other documentary evidence of the proper laying out by the proper authorities, pursuant to statutes, or by evidence either of immemorial usage, or of dedication of the road to public use. . . . Dedication may be presumed even against the sovereign; and in all cases, unless the state of the property was such that a dedication of the soil was impossible. The right of the public does not rest upon a grant by deed, nor upon a twenty years' possession, but upon *the use of the land*, with the assent of the owner, for such a length of time, that the public accommodation

and private rights might be materially affected by an interruption of the enjoyment.'

"The effect in the matter of ways, which is given in many cases to a *user*, in establishing a public way, and a dedication of a way to public use, are so nearly identical that they can hardly be treated of separately. Washburn on Easements, 125, Sec. 1. The appellee's theory excludes the idea of a right of way in the public, being established by user, dedication, or prescription."

Vide also City of Cohoes *vs.* D. & H. C. Co., 134 N. Y. 397.

"Ways are either public or private. *A way open to all the people is a highway.*"

Elliot Roads and Streets, (2d Ed.) 1 cases cited.

A statutory dedication is one made in conformity to the provisions of the statute. Such provisions must be substantially complied with, but in many instances dedication invalid as a statutory one will be a good common-law dedication. A distinguishing difference between a statutory and common-law dedication is said to be that the former operates by way of a grant and the latter by way of an estoppel *in pais* rather than by grant.

Ibid, 124.

A statutory dedication operates as a conveyance of an easement, except where the statute declares that a fee shall pass, and is in its essential characteristics a grant of an interest in land, while a common-law dedication generally operates by way of estoppel. The one concludes the owner upon compliance with the provisions of the statute under which it was made, while the other concludes him upon the ground that he has suffered the public and individuals to acquire rights

upon the faith that he has devoted the land to the use of the public as a road or street.

Ibid, 125.

Common-law dedications may be subdivided into two classes, express dedications and implied dedications. In both express and implied common-law dedications it is necessary that there should be an appropriation of land by the owner to public use, in the one case by some express manifestation of his purpose to devote the land to public use—in the other by some act or course of conduct from which the law will imply such an intent. An implied dedication is one arising, by operation of law, from the acts of the owner. It is not founded on a grant, nor does it necessarily presuppose one, but it is founded upon the doctrine of equitable estoppel. As said by this court in Cincinnati *vs.* White, 6 Peters 431, "the law considers it in the nature of an estoppel *in pais*" and holds it irrevocable. See, also, Morgan *vs.* Railroad, 96 U. S. 716.

While it is essential that the donor should intend to set the land apart for the benefit of the public, such intention must not be a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intention. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner can not, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose. If the open and known acts are of such a character as to induce the belief that the owner intended to dedicate the way to public use, and the public and individuals act upon such conduct, proceed as if there had been in fact a dedication, and acquire rights which would be lost

if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intention.

> Elliot Roads and Streets, (2d Ed.) 135, cases cited.
> Morgan *vs.* Railroad, 96 U. S. 716.

Judge Elliot remarks:

> "A misconception of the true meaning of the rule that the intent to dedicate must be clearly shown, has, it seems to us, carried some courts to erroneous conclusions. While it is true that this intent must always appear to exist, it is not true that it must always in fact exist in the mind of the owner. To hold this strictly would be to adopt a more rigorous rule than is elsewhere recognized in civil or criminal jurisprudence."

After citing instances where negligence supplies the place of intent he says:

> "In one of the familiar mixims of the law is expressed a principle that should be applied in cases of dedications, and that is that a man is presumed to intend the usual and natural consequence of his acts. There is no reason why sound general principles found to be wise and salutary in other instances should not apply to dedications. The subject is comparatively new, and some courts have treated it as though it formed a distinct and independent branch of the law, founded upon peculiar principles and not governed by ordinary legal rules. It will, however, be found on investigation and reflection that this is an altogether erroneous view."
>
> Elliot Roads and Streets, 137.

It is not necessary in any event that the conduct of the owner should be such as indicates a purpose to mislead or deceive others. The ground upon which implied dedications are sustained does not necessarily involve the good or

bad faith of the landowner, for whatever may have been his secret purpose, good or evil, if by his conduct he has induced rightful action upon the part of others, he must be held to the consequences of that which his own acts made appear to the minds of men of fair prudence to have an actual existence. Having created the appearance which has induced others to act, he is in no situation to aver as against them that what he made appear to have an actual existence had no existence at all.

Elliot Roads and Streets, 140.

Said the Supreme Court of Oregon:

> "He who induces the public to believe his land a gift or knowingly permits them to use or treat it as their own until they have so accustomed themselves and adjusted their property to accommodate their business to it that they can not without detriment be dispossessed, confers that which he can no more resume without a wrong than he can rightfully seize what was acquired otherwise than by his gift. '*Turpi est fidem fallere.*'—'It is base to disappoint the expectations we have authorized'—is the key-note of the common and civil law of which equity is compounded."
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> Parrish *vs.* Stephens, 1 Ore. 59.

A dedication may be accepted by representatives of the public, having authority over highways or by the public by general use of the way. An implied acceptance arises in cases where the public authorities have done acts recognizing the existence of a highway and treating it as one of the public ways of the locality. One of the principal indications of acceptance, is that of improving or repairing the road. The later authorities have removed the uncertainty as to whether use by the public will amount to an implied acceptance of the highway, and the opinion now generally prevails that the acceptance may be implied from a general and long continued use by the public as of right.

Elliot Roads and Streets, 163 and cases cited.

In Lehigh Valley RR. *vs.* McFarlan, 43 N. J. L. 605, it was held that after an unexplained user of an open, notorious, and adverse character for the required period, a presumption *juris et de jure* arises and a right has been conferred by law. That case was an action to recover damages for injury to a mill site by back-water cast upon it by means of a dam. The defendant contended at the trial that the right to maintain its dam had been acquired by adverse enjoyment, and the court in the course of its opinion reversing the judgment of the lower court said in part:

> "The whole doctrine of prescription is founded on public policy. It is a matter of public interest that title to property should not long remain uncertain and in dispute. The doctrine of prescription conduces, in that respect, to the interest of society, and at the same time is promotive of private justice by putting an end to and fixing a limit to contention and strife. *Protests and mere denials of right are evidence that the right is in dispute, as distinguished from a contested right. If such protests and denials, unaccompanied by an act which in law amounts to a disturbance, and is actionable as such, be permitted to put the right in abeyance, the policy of the law will be defeated, and prescriptive rights be placed upon the most unstable of foundations.* Suppose an easement is enjoyed, say, for thirty years. If, after such continuance of enjoyment the right may be overthrown by proof of protests and mere denials of the right, uttered at some remote but serviceable time during that period, it is manifest that a right held by so uncertain a tenure will be of little value. If the easement has been interrupted by an act which places the owner of it in a position to sue and settle his right, if he chooses to postpone its vindication until witnesses are dead or the facts have faded from recollection, he has his own folly and supineness to which to lay the blame. But if by mere protests and denials by his adversary his right might be defeated, he would be placed at an unconscionable disadvantage. He could neither sue and establish his right, nor could he have the ad-

vantage usually derived from long enjoyment i
quieting titles.

"*Protests and remonstrances by the owner of the servie
tenement against the use of the easement rather add to th
strength of the claim of a prescriptive right, for a holdin
in defiance of such expostulations is demonstrative proo
that the enjoyment is under a claim of right, hostile an
adverse, and if they be not accompanied by acts amoun
ing to a disturbance of the right in a legal sense, they a
no interruptions or obstructions of the enjoyment.*

"The instructions of the judge were erroneous i
this respect. The jury should have been told that
continuous enjoyment under a claim of right fo
twenty years, not obstructed by some suable act, an
having the other qualities of an adverse user, confe
an indefeasible right."

Lord Kenyon, in Rugby Charity *vs.* Merryweather, 1
East, 376 *n*, in which an uninterrupted user of eight yea
was held sufficient without reference to the question of in
tention, said:

"During all that time, the public at large wer
permitted to have the free use of the way withou
any impediment whatever, and therefore, it is no
too late to assert the right, for there is quite a suff
cient time for presuming a dedication of the way t
the public. In a great case which was much co
tested, six years was held sufficient."

Moreover a flagrant vice in said second prayer is con
tained in the language—

"and the jury are further instructed that if the use
is by permission, leave, license, or indulgence of th
party over whose land such use is enjoyed, . .
or can, in view of all the evidence, be placed upo
any other footing than a claim or assertion or righ
it will repel any presumption of a grant and will b
what is called a precarious use, and such a precariou
use never ripens into an adverse use, no matter ho
long it continues."

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It is submitted that if the use is under a claim of right, it is utterly immaterial whether the party over whose land the use is enjoyed permits or objects to it.

The burden of proof was thus improperly put upon the plaintiff in error, for,—

> "when there has been user of a way, whenever the claimant saw fit, extending over a time equal to that required to establish a prescriptive way, the burden is upon the land owner to show that the user was by license or contract unconnected with a claim of right of way on the part of the claimant."
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> Garret *vs.* Jackson, 20 Penna. St. 331.
> Pierce *vs.* Cloud, 42 Penna. St. 102.

In any event the instruction should not have read "or can in view," etc., but should have been in the conjunctive "and can in view," etc. Furthermore, the jury were instructed that the conditions set out in the prayer "will repel any presumption of a grant," whereas the jury should have been told "it may repel," etc. The jury were thus instructed that as matter of law these conditions prevented them from finding a grant.

The eighteenth prayer (Rec., p. 47) should have been granted; and the jury should have been instructed that Harewood road was a public highway by dedication.

As was said by Thompson, Justice, in Cincinnati *vs.* White, 6 Pet. at 440: "There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. This was the doctrine in the case of Jarvis and Dean, 3 Bing. 447, with respect to a street, and the same rule must apply to all public dedications; and from the mere use of the land, as public land thus appropriated, the assent of the owner may be presumed. In the present case, there having been an actual dedication fully proved, a continued assent will be presumed until a

dissent is shown; and this should be satisfactorily established by the party claiming against the dedication. In the case of Rex *vs.* Lloyd, 1 Camp. 262, Lord Ellenborough says, if the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public."

In Barclay *vs.* Howells, Lessee, 6 Pet., at 513, Mr. Justice McLean said: "The town was laid out in the spring or summer of 1784; no act was done by the proprietors showing any claim to the land in controversy until September, 1814, when the deed to Wilson was executed. Here is a lapse of about thirty years, within which no right is asserted by the Penn family hostile to what was exercised by the city in the use of this ground to the extent which its means enabled it to improve and the public convenience seem to require. A title which has remained dormant for so great a number of years, and while the property was used for public purposes, and necessarily within the knowledge of the agents of the proprietors, is now asserted under doubtful circumstances of right. In some cases a dedication of property to public use, as for instance a street or public road, where the public has enjoyed the unmolested use of it for six or seven years, has been deemed sufficient evidence of dedication. This lapse of time, connected with the public use and the determination expressed by the agent at the time the town was laid out to dispose of the whole of the manor, affords strong grounds to presume that no reservation of any part of the manor was intended to be made, and that the slip of land in controversy was not reserved. These were facts proper for the consideration of the jury in determining the fact of dedication. They were calculated to have a strong influence to rebut the presumption relied on by the plaintiff in the court below.

"If it were necessary, an unmolested possession for thirty years would authorize the presumption of a grant. Indeed, under peculiar circumstances a grant has been presumed from a possession less than the number of years required to bar the action of ejectment by the statute of limitations.

"By the common law the fee in the soil remains in the original owner where a public road is established over it; but the use of the road is in the public. The owner parts with this use only, for if the road shall be vacated by the public he resumes exclusive possession of the ground; and while it is used as a highway, he is entitled to the timber and grass which may grow upon the surface, and to all the minerals which may be found below. He may bring an action of trespass against any one who obstructs the road."

In Irwin *vs.* Dixion, 9 How. 31, this court has said on the subject of dedication:

> "The idea of a dedication to the public of a use of land for a public road must rest on the clear assent of the owner in some way to such dedication. This assent may be proved by a deed or unsealed writing expressing such assent, or, as no fee in the land, but only an easement generally is given, it may be by parol *or by acts inconsistent and irreconcilable with any construction except such consent.*"

Mr. Justice Swayne, in Morgan *vs.* Railroad Co., 96 U. S. 723, said: "The question whether a person intends to make a dedication of ground to the public for a street or other purpose must be determined from his acts, and statements explanatory thereof, in connection with all the circumstances which surround and throw light upon the subject, and not from what he may subsequently testify as to his real intent in relation to the matter. The City of Columbus *vs.* Dahn, 36 Ind. 330. All that is required is the assent of the owner and the use of the premises for the purposes intended by the appropriation. The law considers the owner's acts and

declarations as in the nature of an estoppel *in pais* and precludes him from revoking the dedication. Cincinnati *vs.* White, 6 Pet. 431; Holden *vs.* Cold Springs, 24 N. Y. 474."

The Court of Appeals says (Rec., p. 66):

> "The use of said road began, and was permitted for the accommodation of the owners of the adjoining lands, and other neighbors were permitted to pass over the same for convenience,"—

but it omitted part and parcel of the same evidence offered by the defendants in error themselves (Rec., p. 21), "*and, finally, people generally were permitted to travel over it.*" Yet the court says (Rec., p. 70):

> "The evidence rather tends to show a permissive use confined to the neighboring land owners and a few other persons who found it convenient to travel thereon long after 1837."

But, we submit, it is not competent for the owner to testify as to his original intention in respect of dedication. That intention is to be gathered from his conduct in connection with surrounding circumstances.

Morgan *vs.* Railroad Co., *supra.*
Brown *vs.* Stark, 83 Cal. 636.
Perkins *vs.* Fielding, 119 Mo. 149.
Nash *vs.* Village West Troy, 151 N. Y. 453.

Nor will testimony as to the secret intention be allowed to overcome presumptions clearly arising on the facts and circumstances of the transaction.

Denver *vs.* Clements, 3 Colo. 484.
Littledale, Justice, in Barraclough *vs.* Johnson, 8 Ad. & E. 99, 105.
Addison Torts, Sec. 302.

The question whether there was an intention to dedicate where the facts are undisputed and where they admit of but

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one legal interpretation, or can lead to one conclusion only, is a question of law.

White *vs.* Bradley, 66 Me. 254.
State *vs.* Schwin, 65 Wis. 207: 26 N. W. Rep. 568.
Kennedy *vs.* Mayor, 65 Md. 514.
Marion *vs.* Skillman, 127 Ind. 130.

It has been held that where there is a dedication, it will be presumed, in the absence of countervailing circumstances, that it was to the public at large and not to a part only of the community.

Penny Pot Landing *vs.* City of Philadelphia, 4 Harris, 79.

Confusion has resulted from confounding dedications resting upon presumptions with the right given by the statute of limitations. Twenty years' use by the public under claim of right evidenced by the use will give a right to the road or street, of which the owner of the fee can not divest the public, no matter what may have been his intention. Irrespective of the question of intention, uninterrupted user may give the public an irrevocable right. . . . Public use, for the period of twenty years, makes the public right as unimpeachable as if it had been created by an express grant, and there need not be any evidence whatever of an intention to dedicate.

Elliot on Roads and Streets, 171, and cases cited.

If the owner of the soil throws open a passage, and neither marks, by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing over it by positive prohibition, he shall be presumed to have dedicated it to the public. Although the passage in question was originally intended only for private conve-

nience, the public are not now to be excluded from it after being allowed to use it so long without any interruption.

Rex *vs.* Lloyd, 1 Campb. 260.
Rugby Charity *vs.* Merryweather, II East, 375, note.
Woodyear *vs.* Hadden, 5 Taunt. 125.
Wood *vs.* Veal, 5 Barn. & Ald. 454.

The common-law principle of dedication is made up of several distinct elements.

The intention to dedicate may be presumed from the owner's acquiescence in those conditions which in law are evidence of dedication.

Columbus *vs.* Dahn, 36 Ind. 330.
Smith *vs.* State, 23 N. J. L. 712.

The acceptance by the public may be by use.

Cincinnati *vs.* White, 6 Pet. 431.
Hemphill *vs.* Boston, 8 Cush. 195.
Pomfrey *vs.* Saratoga Springs, 34 Hun, 607.
Guthrie *vs.* New Haven, 31 Conn. 308.
Stone *vs.* Brooks, 35 Cal. 489.

The length of time user by the public continues has been held immaterial in a common law dedication, as intention is the fundamental element in dedication, and the dedication is established when the intention is first shown to have existed.

Reg. *vs.* Petrie, 30 Eng. L. & Eq. 207.
Wyman *vs.* State, 13 Wis. 664.
Green *vs.* Oakes, 17 Ill. 249.
State *vs.* Taff, 37 Conn. 392.
Chapin *vs.* State, 24 Conn. 236.
Jarvis *vs.* Dean, 3 Bing. 447.
Rowan *vs.* Portland, 8 B. Mon. 232.

When long user is relied on to prove dedication it need not be shown by whom the dedication was made.

Reg. *vs.* Petrie, 30 Eng. L. & Eq. 207.
Queen *vs.* East Mark, 11 Q. B. 877.

The element of adverse right, where the bare fact of user for twenty years is relied on to constitute dedication, is supplied by an uninterrupted enjoyment by the public for twenty years.

Onstott *vs.* Murray, 22 Iowa, 457.
Thayer *vs.* Boston, 19 Pick.
Green *vs.* Oakes, 17 Ill. 249.
Holt *vs.* Sargent, 15 Gray, 97.
Jennings *vs.* Tisbury, 5 Gray, 74.
Valentine *vs.* Bosten, 22 Pick. 75.

And a public use of property or rights for twenty years without interruption has been held sufficient evidence of dedication without further proof.

Barclay *vs.* Howell, 6 Pet. 498–513.
New Orleans *vs.* United States, 10 Pet. 718.
Parrish *vs.* Stephens, 1 Ore. 59.
Lemon *vs.* Hayden, 13 Wis. 167.
M'Connell *vs.* Lexington, 12 Wheat. 582.
Waugh *vs.* Leech, 28 Ill. 488.

This proposition rests upon the theory that a user uninterrupted and unexplained for twenty years is adverse.

Blake *vs.* Everett, 1 Allen, 248.
Leonard *vs.* Leonard, 7 Allen, 277.
Barnes *vs.* Haynes, 13 Gray, 188.
Sargent *vs.* Ballard, 9 Pick. 251.
Samuels *vs.* Borrowscale, 104 Mass. 210.
Hammond *vs.* Zehner, 21 N. Y. 118.
Perrin *vs.* Garfield, 37 Vt. 304.
Polly *vs.* McCall, 37 Ala. 20.

And the presumption of a grant or dedication arising from twenty years' uninterrupted and unexplained user by the public is imperative and conclusive.

Tyler *vs.* Wilkinson, 4 Mason, 397.
Leonard *vs.* Leonard, 7 Allen, 277.
Ross *vs.* Thompson, 78 Ind. 90.
Veale *vs.* Boston, 135 Mass. 187.
State *vs.* Atherton, 16 N. H. 203.
Stevens *vs.* Nashua, 46 N. H. 192.
Wood *vs.* Hurd, 34 N. J. L. 87.

Dedication once complete is irrevocable.

New Orleans *vs.* United States, 10 Peters, 662.
Dummer *vs.* Den. Jersey City, 20 N. J. L. 86.
Kennedy *vs.* Cumberland, 65 Md. 514.
Post *vs.* Pearsall, 22 Wend. 425.
Warren *vs.* Jacksonville, 15 Ill. 236.

It will be sufficient if the road was traveled as much as the circumstances of the surrounding population and their business required.

Baldwin *vs.* Herbst, 54 Iowa, 168.
Bodfish *vs.* Bodfish, 105 Mass. 317.
Com. *vs.* Petitcler, 110 Mass. 62.
Schatz *vs.* Pfeil, 56 Wis. 429.

Denials of the right, complaints, remonstrances or prohibition of the use of the way, made by the owner of the fee, if unaccompanied by acts which in law would amount to a disturbance of the right and be actionable as such, will not prevent the acquisition of a right of way by prescription.

Lehigh Valley RR. Co. *vs.* McFarlan, 43 N. J. L. 605.
Kimball *vs.* Ladd, 42 Vt. 747.

II.

Questions of Law were Submitted to the Jury.

By sustaining the granting of the eighth prayer (Rec., p 41) of the defendants in error, the court submitted to the jury to find and determine whether the plaintiff in error had acquired the right of common and public highway in Harewood road, a mixed question of law and fact; and also submitted to their determination a pure question of law, to wit: Whether the District of Columbia had done the acts constituting the alleged trespass "*without the execution of its lawful powers according to law.*"

By sustaining the granting of the eleventh prayer (Rec., p. 42) of the defendants in error, the court submitted to the jury another question of law, to wit: Whether "*the gravel was obtained incident to the lawful exercise of the power to grade.*"

The eighth prayer was as follows:

> "If the jury believe from the evidence that at the time of doing the acts complained of, which are in evidence, there was a right of common and public highway in the defendant to a road of only about twenty-five feet or less in width over the land of the plaintiffs' testator, and that an excavation in excess of the defendant's right of highway and of about thirty-three feet in width was made by the defendant upon the land of plaintiffs' testator, and believe from the evidence that the defendant so exceeded its right of highway and excavated gravel on the land of the plaintiffs' testator and removed and used the same beyond the limits of said land to repair or improve other public highways in the District of Columbia without making just compensation to the owner of the soil or having any condemnation proceedings *or exercising its lawful powers according to law, then, the jury are instructed that the defendant would be liable as a trespasser for so doing*, and that the jury must find for the plaintiff and assess such damages as the evidence shows would make them whole."

Mr. Chief Justice Alvey, in his dissenting opinion (Rec., p. 79) commenting on this eighth prayer, said:

> "By the eighth prayer, the jury were instructed that if, at the time of the doing of the acts complained of, there was a right of common and public highway in the defendant to a road of only about twenty-five feet or less in width over the land of the plaintiffs' testator, and that an excavation in excess of the defendant's right of highway, etc., was made by the defendant, etc.; and, that, 'if the defendant did the acts complained of without the execution of its lawful powers according to law, then, that the defendant would be liable as a trespasser for so doing, and that the jury must find for the plaintiffs, and assess such damages as the evidence shows would make them whole.'
>
> "What the jury may have understood from this instruction is not free of doubt, either as to the matter of right in the *locus in quo*, or as to the measure of damages. What constitutes a right of common and public highway, is a mixed question of law and fact. The jury should have been required to find the facts, and the court, in its instructions have defined, hypothetically, what facts, if found, would constitute a right of common and public highway. But the jury were left to determine whether there was any such right of common and public highway in the defendant, and upon their conclusion in the negative, the defendant was left in the position of and liable as an unqualified trespasser. Then, too, the jury were required to pass upon the question, whether the defendant had acquired the right to the way in question in the exercise of its lawful powers, according to law. This was certainly a question of law, dependent upon the facts that might be found by the jury. But the proposition, as stated in the prayer, was doubly misleading, as the right of a public way may be acquired by public use, without the agency or authority of municipal power."

The eleventh prayer was as follows:

> "The burden of proof is upon the defendant to satisfy the jury that the gravel was obtained incident to the legal exercise of the power to grade. Such power to be lawful must have been exercised by the Commissioners jointly. It could not he exercised by any one of the said Commissioners, as the power could not in law be delegated. *If the gravel obtained and used was not the incident to the exercise of the power to grade, but was obtained without the lawful exercise of the power to grade,* then the use of the said gravel, as well as the excavation, was unlawful, and the defendant has not maintained it plea of justification. If the evidence shows to the satisfaction of the jury that said grading or the removal of said gravel was done under the supervision of the officers and by the employees of said defendant, it will be competent for the jury to presume from this fact that it was authorized and directed by the joint action of the Commissioners of the defendant, unless there be evidence that satisfies them that the contrary is the fact."

Here the jury were to find whether the gravel was obtained "*without the lawful exercise of the power to grade;*" and if they found it was so obtained, then the use of the gravel as well as the said excavation was declared to be unlawful.

The same vice was carried into the ninth prayer (Rec., p. 45) of the plaintiff in error, by the court's amendment thereof.

The eleventh prayer also contained the element that, if only one of the District Commissioners directed the change in the grade of Harewood road, such change was unlawful; meaning, we suppose, that the act was *ultra vires* of one Commissioner; and yet at the same time, the jury were told in effect that the District of Columbia was liable for such act.

III.

The Twelfth Prayer (Rec., p. 42) of the Defendants in Error also Submitted to the Jury Questions of Law. It Undoubtedly Misled the Jury.

By sustaining the granting of the twelfth prayer (Rec., p. 42) of the defendants in error the court submitted to the jury to find and and determine both the law and facts of the case, and also held that if the jury found any one of the facts enumerated in said prayer, without regard to its probative force, it would tend to prove Harewood road was not a public way and would rebut any presumption that it was a public highway.

The said twelfth prayer was as follows:

> "If the jury believe from the evidence that there was a lane or road over the land of the plaintiff's testator, yet if from the evidence the jury believe that travel over said lane or road originated for the accommodation of some prior owner or owners of that tract and the adjoining tract, or either of said tracts, and of those deriving title from or under such owner or owners of either or of both of said tracts, and believe that said lane or road was never surveyed, platted, or recorded as a public road or highway, as required by law, and believe that the various owners of said tract of land by mesne conveyances conveyed the same from one to the other, with covenants of warranty, without showing, mentioning, or excepting any lane or road over the same, either in the body of any of these deeds or in plats annexed to any of them, and believe that the location of said lane or road or part thereof over the land of the plaintiffs' testator was changed by Mr. John Agg, a prior owner of said land, for the reason that he wished it further from his house, and that he employed and paid the hands who made this change, and believe that from about 1843 to about the time of the conveyance of May 15th, 1857, to the plaintiffs' testator gates were maintained across said lane or road by the owner or

owners of said tract or their tenants, and that the gateposts of such gates continued to stand for some time after the gates themselves wore out or disappeared, and stood there until some time in 1861, after the late war had commenced, and believe that taxes were assessed by the public authorities upon and paid by the owners of said land or their tenants upon said tract of land, as a whole, including land within the limits of said lane or road, and believe that acts of ownership over the land within the limits of said lane or road were exercised by the plaintiffs' testator, and believe that said lane or road was not repaired by the public authorities until after the late civil war, or recognized by the public authorities as a public road until after the late civil war, or if the jury believe any of these facts, then the jury are instructed that these facts or any of them which the jury may believe would tend to prove that said lane or road was not a common or public highway, and would tend to rebut any presumption of its being a common or public highway, and any and all such facts, if believed by the jury, are to be considered in connection with the other evidence in the case, and if the jury upon the whole evidence believe that said lane or road was not such a highway at the time of the acts complained of which have been given in evidence, and was not a highway by dedication, then they should find the issue joined upon the defendant's third additional plea of highway in favor of the plaintiffs."

Mr. Chief Justice Alvey, in his dissenting opinion, commenting on this twelfth prayer, well said:

"But I think the greatest error in this respect is to be found in the twelfth prayer. After enumerating certain facts and circumstances given in proof by the plaintiffs, but wholly ignoring any reference whatever to the specific facts and circumstances given in evidence by the defendant, the prayer proceeds to instruct, that "if the jury believe *any of these facts*, then they are instructed that these facts, *or any of them which the jury may believe*, would tend to prove that said lane or road was not a common or public

highway, and would tend to rebut any presumption of its being a common or public highway, and *any* and all such facts, if believed by the jury, are to be considered in connection with the other evidence in the case, and if the jury, upon the whole evidence, believe that said lane or road was *not such a highway*, at the time of the acts complained of, which have been given in evidence, *and was not a highway by dedication*, then they should find in favor of the plaintiffs.' By this prayer, the jury in effect were instructed, that any one of the enumerated facts, without regard to its probative force, if believed by them, would tend to prove that the road was not a public way, and would tend to rebut any presumption that it was a public highway. Indeed, this prayer virtually submitted the whole case to the jury, including both law and fact. For, as I have said, what constitutes a public highway, in its various modes of establishment, as distinguished from a private way, is matter of law, dependent upon facts that may be found by the jury (Co. Litt., 56 A); and so the question of dedication is one of mixed law and fact; and whether any given state of facts will constitute dedication or not is a question of law to be decided by the court. By the twelfth prayer, however, the jury were required to find not only the facts, but to determine what constituted a public highway, acquired by prescription or otherwise, as distinguished from a private way, and they were also required to determine not only the facts, but what would or would not amount to dedication of the way to public use.

"It is not my purpose to go into an examination of the case at large, but only to point out some of the objectionable features in the prayers to which I have referred, as misleading to the jury. I think those prayers ought to have been rejected. It is impossible to say to what extent the objectionable propositions they contain may have affected the conclusions of the jury; and it will not do say, what can not be known as a matter of certainty, that the vice of these prayers, in the contemplation of the

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jury, was corrected by other instructions. It is my opinion, upon the whole case, that the judgment below ought to be reversed, and a new trial ordered. And I am more decidedly of this opinion, because of the uncertainty upon what theory or ground the verdict was founded; whether upon the theory supposed to be established by the evidence, that there was in reality no public right of way, or that such right of way, if it existed, had been used in excess of such public right, and so as to render the defendant liable as for a trespass. I think the finding of the jury should have been so directed by the instruction of the court, as to preserve the right of the public in the way, if such right really exists. The finding under the instructions given, and the judgment thereon, leave the matter in entire doubt as to how the right really stands—whether the public has further right to use the way or not. And so the authorities of this District will be in doubt, whether they will not incur the perils of trespassers, in attempting to enter upon the way to make needful repairs, or to exercise other authority over it. This result, I think, should have been avoided, by special direction as to the form of the verdict, in view of the manner in which the case was presented to the jury on the prayers for instruction."

Furthermore, it will be observed that the trial court, while it submitted to the jury to find questions of law, at the same time by modifying the twelfth prayer of the plaintiff in error (Rec., p. 46) deprived it of the presumption *omnia rite acta* in respect of public acts required to be performed by it in the matter of surveying and recording a public highway.

IV.

Continuous Use does not Mean Constant Use.

There was error in sustaining the granting of the fourth prayer (Rec., p. 40) of the defendant in error. The jury were told that a prescriptive right of highway is confined

to the width as actually and *without any intermission* used for the period of twenty years. By this prayer the jury were instructed that the planting of the boundary stones mentioned in the evidence, if it occurred before the acts complained of, did not extend the easement by prescription beyond the lines and width of such actual use. This instruction was confusing and calculated to mislead the jury, for if Mr. Robinson knew of the planting of those stones and did not in his lifetime object to them, then he must be taken to have understood the claim of the public to be a road of the width of 33 feet, and to have acquiesced in that claim. Again, the jury were told that—

> "the right to an easement of common and public highway acquired by prescriptive use of the road is confined to the lines and width of the road as *actually used* for and *at the end* of the period of twenty years."

What did the jury understand by "actually used?" Did they not from that language understand that the *entire road* must have been used *all the time*, without intermission, and that if that condition of use did not exist at the exact period of "the end of the period of twenty years," the public lost its rights in the road, although the same may have been commonly used as a public highway immediately before the end of twenty years, or for many years thereafter.

Ames, J., said in Bodfish *vs.* Bodfish, 105 Mass. 317:

> "It is certain 'continuous use' does not mean 'constant use.' A right of way means a right to pass over another's land, more or less frequently, according to the nature of the use to be made of the easement, and how frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass. It must appear not to have been interrupted by the owner of the land across which the right is exercised nor voluntarily abandoned by the claimant; mere interference is not interruption."

V.

The District of Columbia Had the Right to Ease the Grade of Harewood Road and to Remove the Soil in Said Road and Use the Surplus Earth and Gravel in Improving Other Public Highways Belonging to the Same System of Highways.

There was error in allowing the jury in this case, under the modification of the ninth prayer (Rec., p. 45) of the plaintiff in error, to consider the motives of the Commissioners in grading Harewood road, and in refusing to grant the twenty-third prayer (Rec., p. 48), and holding that the defendants in error were not bound by the answer of the Commissioners to the bill of discovery filed by Mr. Robinson in his lifetime, respecting the *bona fides* of their action in connection with the alteration of Harewood road and the purpose of such alteration.

If Harewood road was a public highway, then it was the duty of the District of Columbia, acting by its Commissioners, to improve it, and make it fit for public travel. If, in doing so, it was found necessary to remove earth and gravel, this might be done, and the surplus earth and gravel used in improving other public highways belonging to the same system of highways.

Although the abutting owner may own the fee of a public road, he has no title to the surplus soil resulting from grading or improving it.

The right of removal of soil from one public highway to repair another was considered by Mr. Justice Gray in the case of Denniston *vs.* Clark, 125 Mass. 216. In the course of the opinion the court said: "It is too clear to require any discussion that the proprietor of land over which a public highway has been laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public or by any

corporation by authority derived constitutionally from the legislature. The owner of the land therefore retains his title in trees, grass, growing crops, buildings, and fences standing in the highway at the time of laying out (unless he fails to remove them within a reasonable time after notice to do so), as well as in any mines or quarries beneath, which are not part of the surface of the earth upon and of which the highway is made.

"It is equally clear that the grant of such an easement to the public, or to the corporation to which its rights have been delegated, authorizes the doing of any act in the highway, including the digging down or raising the soil to any extent that is necessary or proper to make and keep the way safe and convenient for the public travel.

"All acts done for the purpose of repairing the way are of this character, although they may require the removal of the soil from one part of the way to another, and it is accordingly well settled that the public in the case of a highway, or a turnpike corporation, or a railroad company in the case of a turnpike or railroad, has the right, acting through proper officers, for the purpose of repairing the same highway, turnpike or railroad, to take earth, gravel, or stones from one part and deposit them on another, although if the officer applies them to other uses he may become liable as a trespasser."

In Elliot on Roads and Streets the same doctrine is laid down. Speaking, at page 745, of the right of a municipal corporation to remove earth from a street for the improvement of another forming part of the same system, the author says:

> "If its removal is necessary the city can not even then use it in the improvement of other streets not included in the same general plan of improvement over the objection of the owner of the fee who wants it for his own use. But 'where there is a general

> plan for the gradation and improvement of highways, intersecting streets and highways, in the vicinity of the one improved they are to be deemed part of the same general plan, and soil may be removed from one and placed upon another.'"
>
> See also Dill. Munic. Corp., Sec. 687.

There is no material difference in principle with regard to the extent of the rights of the public in public highways, whether the fee is in the public, or in the adjacent landowner, or in some third person.

> Barney *vs.* Keokuk, 94 U. S. 340.

The motive and purpose of the Commissioners in grading Harewood road can not be inquired into, as was allowed in this case.

In Wabash Railroad Company *vs.* Defiance, 160 U. S. 88, which involved the authority of the common council of Defiance, Ohio, to change the grades of certain streets crossing bridges over the Wabash Railroad, the point was made that the discretion of the common council was not wisely exercised. In overruling this contention this court, speaking by Mr. Justice Brown, said:

> "But however this may be, we are not at liberty to inquire whether the discretion vested in the common council of determining this question was wisely exercised; *or what the motives were for making the change;* or whether the crossing so improved was burdensome to the railroad company; or made unsafe to persons crossing the track. These were considerations which might properly be urged upon the common council as arguments against the proposed change; but it is beyond the province of the courts either to praise the wisdom or criticise the unwisdom of such action. The question before us is simply whether the council had the power to make the change, and of this we have no doubt."

If the motive and purpose of the Commissioners could be inquired into, then the jury should have been told, in accordance with the twenty-third prayer (Rec., p. 48), that the defendants in error were bound by the answer of the Commissioners and the District of Columbia to the bill for discovery filed by their testator offered in evidence by them, so far as said answer was responsive to the allegations of said bill, and that they were not at liberty to ignore said answer or find the facts otherwise than as therein set forth. These answers showed the entire *bona fides* of the Commissioners, set up a public highway, that the alteration in the road was made for the purpose of improving it, and that the surplus earth and gravel was used in improving other public highways forming a part of the system of roads to which Harewood road belonged; and these answers were accepted by the plaintiffs' testator and remained without objection or exception thereto to the present time.

In Glenn *vs.* Grover, 3 Md. 212, a bill was filed to set aside as fraudulent, against creditors, two deeds. The bill propounded special interrogatories predicated upon some of the averments. The bill and interrogatories were met by positive denials under oath. On this point the court said:

> "The validity of these deeds depends upon the intention of the parties defendant. As to their design, they have been called on by the complainant to speak, and in such a case an answer responsive to the bill, emanating from a party made a witness by the act of the complainant, speak in reference to the motives and views under the influence of which the transfer in dispute was made, a matter lying necessarily within his own bosom, must be held as conclusive upon the question of intention, unless it is overcome by the testimony of two witnesses, or that of one witness with corroborating circumstances."

VI.

There was Error in Allowing the Jury to Enhance Damages by any Sum Not Greater than the Interest on the Amount From August 28, 1882, When the Action Was Brought, to the Time of the Trial.

This action, it will be remembered, was tried, not upon the original declaration filed August 28, 1882, but upon an "amended declaration," which was not filed until October 29, 1886.

The original declaration was wholly superseded by the amended declaration, which is complete in itself; it does not refer to or adopt the original as a part of it.

> 1 Ency. of Pleading and Pr., 627 and cases cited.
> Washer *vs.* Bullitt County, 110 U. S. 558–567.

The original suit stood *abated* more than *two years*, by reason of the death of Mr. Conway Robinson. The defendants in error *delayed three months* in filing their joinder of issue, and then delayed bringing the case to trial for *eight years* thereafter. The granting of this prayer in effect told the jury that they could allow the defendants in error damages for their own delay and neglect. There was nothing in the evidence from which the jury could find that the allowance of interest "would be reasonable and just." The jury were, in effect, told that after fixing such damages as "would make the plaintiff whole," they might add to such damages, interest.

In this case the damages claimed were $50,000. They were set so inordinately high as to at least justify the public authorities in refusing to pay them on demand. The value of the gravel and earth itself removed was set at $10,000 Their proof was (Rec., p. 24), that about 4,000 cubic yards were removed, and that its value was twenty cents a cubic yard. The oppressive and unreasonable demand of the defendants in error and their testator, manifestly caused delay

in the payment of such damages as were really sustained by reason of the alleged tort. The verdict, which included interest from August 28, 1882, was for $8,000.

Phila. Ball Club *vs.* City of Phila. Supreme Court of Penna., October 6, 1899.

Richards *vs.* Gas Co., 130 Penna. St. 37.

The record in this case shows a remarkable condition of things. A tract of land containing about 74 acres is subject to the easement of a public highway; the area covered by the road is one acre and a third, in which the testator of the defendants in error owned the fee, subject to the perpetual easement of the public road, and he could have no practical use of the land within its limits. The public improved the road by cutting down a steep hill and thus easing its grade, and in so doing unimproved wood land on either side, for a distance of about 400 feet, was left above grade, varying from one inch to twelve feet. The owner of this land is dissatisfied with the improvement, insisted that he was damaged, and claimed compensation for 4,683 cubic yards of gravel, at 20 cents per cubic yard, amounting to $936, and the cost of reducing *twelve acres of his land* to the new grade (four acres on the north side of the road, and eight acres on the south side), although two well-known citizens, experienced in suburban subdivisions, who examined the alleged damage in 1889, gave it as their opinion that the change in the grade of Harewood road did not damage said land, but, on the contrary, benefited it. The case was allowed to go to the jury, with an instruction that they might consider the *motive* of the defendant in reducing the grade, and *add interest* to the amount of damages from August 28, 1882, and the result was a verdict for the extravagant sum of $8,000, being more, we submit, than the value of the entire area of the road, free from the public easement.

If, notwithstanding the fact, as shown by the record, that

Harewood road was used as a public highway for more than fifty years before the alleged trespasses; that the testator (Rec., p. 38) acquiesced in such use for nearly a quarter of a century; that part of the area of the road has not been taxed since 1840 (Rec., p. 38); that no gates, bars or barriers of any kind have ever within the memory of man been placed across this road to obstruct its free use by the public; that public money has been expended from time to time in repairing it and making it convenient for public travel, the judgment of the court below is allowed to stand, then it is respectfully submitted the common law maxim, "once a highway always a highway" has no significance whatever, and the District of Columbia, so far as its rural highways are concerned, will be placed in the embarrassing position of being called upon every time it desires to improve one of its public roads to consult the abutting land owners as to the propriety of the proposed improvement, and perhaps to respond in damages for changes of grade, in the event the owner of the *fee* of the road should be dissatisfied with the change.

The judgment of the court below it is respectfully submitted should be reversed and a new trial should be directed.

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